

Federal Communications Commission

DA 04-1736

DOCKET FILE COPY ORIGINAL

FCC MAIL ROOM
JUN 25 3 55 PM '04

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Tullahoma, Tennessee, and
New Market, Alabama)

)
)
)
)
)
)
)

MB Docket No. 03-244
RM-10825

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: June 23, 2004

Released: June 25, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division issued a Notice of Proposed Rulemaking in response to a Petition for Rule Making filed by Tennessee Valley Radio, Inc. ("Petitioner"), licensee of FM Station WHRP, Tullahoma, Tennessee.¹ The Notice proposes to downgrade Channel 227C1 to Channel 227C2 at Tullahoma, Tennessee, to change the community of license from Tullahoma, Tennessee, to New Market, Alabama, and to modify the license of FM Station WHRP accordingly. Petitioner's request was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.² Petitioner filed comments supporting the changes proposed in the Notice. No other comments were received in response to the Notice.

2. In determining whether to approve a change of community, we compare the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.³ The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

3. Adoption of the proposal advanced in this proceeding will not result in any white or gray areas (priorities one and two under the Commission's allotment priorities). Retention of Channel 227C1 at Tullahoma would satisfy only the fourth priority, other public interest matters.⁴ Petitioner's proposal

¹ *Tullahoma, New Market, and Homosassa Springs, Florida*, 18 FCC Rcd 783 (MB 2003) ("Notice"). FM Station WHRP was FM Station WUSX at the time that the petition for rulemaking was filed. This order references the new call letters of the station.

² See *Modification of FM and TV Authorizations to Specify a New Community of License* ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

³ 90 FCC 2d 88 (1982), recon. denied, 56 RR 2d 448 (1983).

⁴ Tullahoma also is served by Stations WAUT(FM)(Channel 203A), WTML(FM)(Channel 218A), and

to allot Channel 227C2 at New Market would provide New Market with a first local service, thus satisfying the third allotment priority.

4. Although New Market is not located within an urbanized area, the specified transmitter site for the proposed allotment would allow FM Station WHPF to place a 70 dBu signal over 82.4 percent of the Huntsville, Alabama, Urbanized Area. In such circumstances, we do not blindly apply a first local service preference; rather, we determine whether to apply a local service preference after evaluating the independence of the proposed community, based upon existing precedent.⁵ The situation presented here, however, differs from one in which a licensee uses the first local service preference as a pretext to enter an urban market, because WHPF(FM) already provides service to 90 percent of the Huntsville, Alabama, Urbanized Area from its current community of license, Tullahoma, Tennessee. In such instances, we have declined to apply *Huntington* and *Tuck*.⁶ Even applying the *Tuck* criteria,⁷ New Market is sufficiently independent of Huntsville to qualify for a first local service preference, for the reasons discussed below.

5. In *Tuck*, the Commission specified the following three factors for evaluating a community's independence: (1) signal population coverage, i.e., the degree to which the proposed station will provide service to both the suburban community and the larger metropolis; (2) the size and proximity of the suburban community relative to the metropolis; and (3) the interdependence of the suburban community with the metropolis. Of these three factors, the most significant is the third.⁸

6. The proposed allotment changes would decrease FM Station WHPF's signal coverage of the Huntsville Urbanized Area. From its current community of license, WHPF provides service to 90 percent of the population of the Huntsville Urbanized Area, and that coverage would decrease to 82.4 percent if the proposed allotment changes are adopted. As to the relative sizes of New Market and Huntsville, New Market's population of 1,864 persons represents approximately 1.2 percent of the population of Huntsville (158,216). New Market is located 28.7 kilometers from Huntsville. As Petitioner points out in its petition for rulemaking, the Commission has granted change of community requests in cases

WJIG(AM)(740 kHz).

⁵ See, e.g., *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C.Cir. 1951) ("*Huntington*"); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*").

⁶ *Long Beach and East Long Angeles, California*, 10 FCC Rcd 2864, 2869 (M.M.Bur. 1995) ("first local service preference is not being used as a basis to enter the market"). See also *Boulder and Lafayette, Colorado*, 12 FCC Rcd 583 (M.M.Bur. 1997).

⁷ See *Ardmore, Brilliant, Brookwood, Badsden, Hoover, Moundville, New Hope, Pleasant Grove, Russellville, Scottsboro, Troy, Tuscaloosa, and Winfield, Alabama, Okolona and Vardaman, Mississippi, and Linden, McMinnville, Pulaski, and Walden, Tennessee*, 17 FCC Rcd 20,536 (MB 2002).

⁸ *Tuck*, *supra*. See also *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6,580 ¶23 (M.M.Bur. 1991), *app. for rev. dismissed*, 12 FCC Rcd 8392 (M.M.Bur. 1997).

involving similar size and distance characteristics.⁹ Moreover, FM stations have been allotted to numerous communities the size of New Market or smaller, and change of community proposals have been approved in instances where the new community was much closer to the central city than is the case in this proceeding.¹⁰ Neither the extent of signal coverage, nor the relative size or proximity of New Market and Huntsville, precludes a finding that New Market is an independent community for allotment purposes.

7. Turning to the most important consideration, the interdependence of the proposed community with the primary city in the urbanized area, we find that Petitioner has established that New Market is an independent community, rather than dependent upon Huntsville for its existence. New Market has its own ZIP code (35761), its own health facilities, its own fire department, and its own school system, consisting of two elementary schools and one high school. There are 15 churches and numerous commercial establishments in New Market, many of which identify themselves by incorporating "New Market" in their names. The Madison County Record, the newspaper serving New Market, is a local media outlet that provides New Market with a distinct advertising market that is independent of Huntsville. Finally, New Market, incorporated in 1837, is perceived by its residents and leaders as separate from Huntsville. For all of the foregoing reasons, we conclude that New Market is an independent community, deserving its own local broadcast service.

8. Because New Market is an independent community, the requested change of community would satisfy priority three of the Commission's allotment priorities, whereas retention of Channel 227C1 at Tullahoma would satisfy only priority four. We therefore conclude that the public interest would be served by downgrading Channel 227C1 to Channel 227C2 and reallocating Channel 227C2 at New Market, Alabama. Channel 227C2 can be allotted to New Market in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 5.2 kilometers (3.2 miles) south of New Market at coordinates 34-51-48 NL and 86-25-38 WL.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283, and 1.420(i) of the Commission's Rules, IT IS ORDERED, That effective August 9, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

<u>Community</u>	<u>Channel Number</u>
New Market, Alabama	227C2

⁹ See *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (M.M.Bur. 1996) (Newcastle had population equal to 0.9 percent of Oklahoma City), and cases cited therein; see also *Old Fort, Fletcher, and Asheville, North Carolina; Surgoinville, Tennessee, and Augusta, Georgia*, 18 FCC Rcd 12181 (MB 2003) (Fletcher located 17 kilometers from Asheville).

¹⁰ See, e.g., *Mullins and Briarcliffe Acres, South Carolina*, 14 FCC Rcd 10516 (M.M.Bur. 1999) (new community of allotment four miles from the central city of the urbanized area).

Tullahoma, Tennessee

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Tennessee Valley Radio, Inc., for FM Station WHRP, IS MODIFIED to specify operation on Channel 227C2 at New Market, Alabama, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules, unless the proposed facilities are categorically excluded from environmental processing

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (3)(1), any party seeking a change in community of license of a TV or FM allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Tennessee Valley Radio, Inc., licensee of FM Station WHRP, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the changes specified above.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this Order to the following:

Mark N. Lipp
J. Thomas Nolan
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004-1008
(Counsel for Tennessee Valley Radio, Inc.)

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Deborah Dupont, Media Bureau, (202) 418-7072.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau